Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

81-390
NO.

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

NEW YORK STATE CHIROPRACTIC ASSOCIATION,

Petitioner,

vs.

A. ALEXANDER PIRENO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August, 1981

I.

Questions Presented

Whether the United States Court of Appeals for the Second Circuit erred in holding that (1) peer review is not the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act ("the McCarran Act"), 15 U.S.C. §§ 1011-1015 (1976), and (2) that the petitioners' use of the procedure is therefore not immune from scrutiny under the antitrust laws.*

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* The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Second Circuit except for Union Labor Life Insurance Company which is submitting a separate petition for certiorari.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
I. The decision of the Second Circuit is in direct conflict with a decision of the Fourth Circuit on the same issue	7
II. The decision of the Second Circuit adversely affects a function of insurance companies and professional societies which is of great importance and benefit to the public	9
CONCLUSION	11

TABLE OF AUTHORITIES

Bartholomew v. Virginia Chiropractors Association, 612 F.2d 812 (4th Cir. 1979), cert. denied, 446 U.S. 938 (1980)	7-9

STATUTE

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976)	*passim*

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Petitioner New York State Chiropractic Association ("NYSCA") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on May 28, 1981.

Petitioner NYSCA joins with and supports the petition for certiorari filed by Union Labor Life Insurance Company in this action. The NYSCA petition for certiorari will supplement the one filed by Union Labor Life Insurance Company.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is officially reported at 650 F.2d 387. The opinion of the United States District Court for the Southern District of New York is unofficially reported in 1979-2 Trade Cases (CCH) ¶ 62,758. Both opinions are included in appendices in the petition for certiorari filed by Union Labor Life Insurance Company.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on May 28, 1981. This petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statute Involved

The McCarran-Ferguson Act

§ 1—Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 2—Regulation or taxation by states; effect of federal statutes; application of anti-trust laws

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 3—Limited suspension of application of antitrust laws

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 4—Applicability of National Labor Relations Act and Fair Labor Standards Act of 1938

[Not Applicable.]

§ 5—Definition of "State"

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

Statement of the Case

NYSCA is a New York not-for-profit corporation formed in 1970 for the purpose, among other things, of acting for and representing the best interests of all New York State chiropractors.

In the late 1960's and early 1970's few health insurance companies provided coverage for chiropractic services. While this was partly the result of opposition from organized medicine, the primary reason for this reluctance to provide such coverage was insurance companies' unfamiliarity with the practice of chiropractic. This unfamiliarity meant that the companies could exercise no effective control on claims and could not tell a valid claim from an unjustified claim. Moreover, those companies that did provide coverage for chiropractic disallowed many of the claims presented because the claims submitted to them were reviewed by medical doctors, who were skeptical of the efficacy of chiropractic.

NYSCA initiated and promoted its program of peer review in an effort to reverse this type of thinking and thereby bring about more widespread coverage of chiropractic services by insurance companies and also to increase the number of claims allowed by companies who provided chiropractic coverage but used medical doctors for review of those claims. Another purpose of the program was, and is, to improve the public image of the profession and to insure the highest standard of care.

Logic told the members of NYSCA that, if more insurance carriers included chiropractic coverage in their policies, more patients who had that coverage would seek the services of chiropractors (J.A.-23).* NYSCA believed that it could induce the carriers to provide such coverage by offering to undertake peer review of chiropractic claims so that the carriers would have available an advisory mediation procedure to assist in the interpretation of their policies.

The typical policy limits payment to "reasonable charges . . . for necessary medical care and services" or to "regular and customary" charges. There were strong indications from the insurance industry that there was need for impartial expert opinion to determine what chiropractic claims were within the limits of the language of the policies.

In addition, NYSCA was concerned about the number of chiropractic claims limited or refused by those carriers who already included chiropractic coverage but used medical doctors for peer review. NYSCA therefore sought to convince those carriers that review by the NYSCA Peer Review Committee (the "Committee") was more appropriate. This was done in the reasonable belief that fewer chiropractic claims would be denied or limited when reviewed by those who were familiar with chiropractic procedures.

The services of the Committee were offered to and accepted by many carriers, including Union Labor Life Insurance Company. Carriers usually request peer review of a particular chiropractic claim after making an initial

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* References to the Joint Appendix on Appeal to the Second Circuit are indicated by "J.A."

judgment that the claim is excessive and out of line with their experience for chiropractic claims for similar services. While most of the requests for peer review come from carriers, respondent Pireno himself made a number of such requests (J.A.-27, J.A.-32). When a request is made, it is accompanied by a file of information which has been submitted to the carrier in support of the claim. The Committee then requests additional information from the treating chiropractor on its own forms. The chiropractor is given the opportunity to appear before the Committee when the claim is considered.

The Committee sends its opinion only to the party requesting review and to the treating chiropractor (J.A.-30). In its analysis prior to reaching an opinion, the Committee uses the collective judgment and experience of all the Committee members, and takes into consideration a number of factors including the experience and overhead of the chiropractor, the nature of the treatment rendered, and the condition of the patient before and after treatment (J.A.-50, 51).

The opinion of the Committee is not binding on any party to the review absent prior stipulation to the contrary (J.A.-28). Respondent Pireno never so stipulated (J.A.-28). If the patient is paid less than his full claim by his insurer, he remains free to claim against his carrier under his policy for the entire amount paid to the treating chiropractor. Similarly, the treating chiropractor remains free to claim against the carrier if he has accepted an assignment, or against the patient if he has not, for the entire amount of his bill. Neither respondent Pireno nor any of his patients has ever made such a claim (J.A.-29).

Respondent rarely accepted any assignments, and never accepted any assignments in which he bound himself to

accept payment from the carrier in full payment of his bill (J.A.-31). Respondent's usual procedure was to be paid in full by the patient at the time treatment was rendered (J.A.-31). Thus, respondent was paid in full, in almost all cases, without regard to the disposition of the patient's later claim against the insurance carrier for reimbursement (J.A.-32).

The carrier is also free to disregard the opinion of the Committee and has done so. In addition, the Committee has no disciplinary powers over the treating chiropractor (J.A.-29). The Committee function is, therefore, completely advisory for all the parties involved—the patient, the carrier and the treating chiropractor. It is a mediation device which any of the parties may invoke for advice and assistance in resolving a dispute with any of the other parties.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Second Circuit is in direct conflict with a decision of the Fourth Circuit on the same issue.

Certiorari should be granted in this case to resolve the conflict between the United States Courts of Appeals for the Second and Fourth Circuits. The case of *Bartholomew v. Virginia Chiropractors Association,* 612 F. 2d 812 (4th Cir. 1979), *cert. denied,* 446 U.S. 938 (1980), involved the same principle as this one and the same facts. However, the Fourth Circuit held there that a voluntary peer review procedure engaged in by a state chiropractic association at the request of insurance companies was part of the business of insurance within the meaning of the Mc-

Carran Act and therefore subject to the McCarran Act exemption from federal antitrust laws.

The conflict between the circuits was noted in the Second Circuit's opinion at footnote 13 where Judge Kearse stated that "the Fourth Circuit recently reached a contrary result in a factually identical case," citing *Bartholomew*. Judge Kearse went on to note that the *Bartholomew* decision was "persuasive authority, but we remain free to disagree with it, and we do so disagree." *Id.*

The conflict between the Circuits should be resolved, and in favor of the Fourth Circuit view. Thus, the protection of the McCarran Act exemption for the voluntary peer review procedures described in this case should be extended to the Second Circuit and to the entire country by this Court's grant of certiorari and reversal of the Second Circuit decision. It is confusing and irrational for professional societies to be able to offer the services of voluntary peer review to insurance companies in the Fourth Circuit only. Voluntary peer review procedures certainly cannot be used in the Second Circuit, nor can they safely be used anywhere else due to the uncertainty of the law except in the Fourth Circuit. Thus, insurance subscribers and the public at large are denied the benefit of voluntary peer review virtually everywhere outside the Fourth Circuit. This unusual circumstance should not be allowed to continue. Certiorari should be granted to resolve the conflict.

II.

The decision of the Second Circuit adversely affects a function of insurance companies and professional societies which is of great importance and benefit to the public.

All practicing professionals whose services are covered by some form of insurance, principally the healing professions, will be most adversely affected by failure to resolve the present confusion among the circuits. The exception, of course, are those professionals practicing in the confines of the Fourth Circuit.

No professional society or group of professionals wishing to perform the public service of voluntary peer review of fees or, as is the moving motive in the case at bar, wishing to provide such service in order to induce continued insurance coverage of their professional fees at the present scope, would dare to do so without the protection of the McCarran Act exemption. The risk of exposure to numerous antitrust actions by providers who are adversely affected by peer review decisions would be too great.

Even though the chance of finding an antitrust offense in peer review is remote, the expense of defending an antitrust action is far beyond the modest means of most professional societies. Certainly this is the case with the NYSCA. The dues which build the treasury of the NYSCA are earmarked chiefly for educational activities and public service purposes. The NYSCA could literally be put out of business by a very few such antitrust attacks on the peer review procedure.

Alternatives to peer review have been suggested by respondent in this action including a fixed fee schedule

to be made a part of the insurance contract. However, such a fee schedule would be difficult to construct and administer. Indeed, if a fee schedule were incorporated in insurance contracts, resort by the insurance company to a peer review committee would remain vital to determine the medical necessity of procedures performed. This, in fact, is now the reason for most of the peer review requests by insurance companies.

In conclusion, it must be noted that the Second Circuit did not adequately inquire into the insurance business to determine if peer review was part of the business of insurance. The analysis and input of amicus drawn from the industry is needed on this point. Thus, a full briefing and argument is required in this case to show the place and need of voluntary peer review in the insurance business. Full exposition by the amicus and the briefs of the parties will also show the utility to the health care consumer of voluntary peer review. This is a potent and practical argument for extending the McCarran shield to this activity, thus insuring voluntary participation in the peer review process by adequate numbers of professionals.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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